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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-536

CLAUDE DAVIS BALLEW,
Petitioner

versus

STATE OF ALABAMA,
Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND APPENDIX

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NOTE: The last paragraph on page 10 should begin thusly:

"Finally, the Court found no provision of Alabama Law for a speedy determination of suits for Declaratory Judgment arising out of matters involving expression 368 F. Supp. 1034, 1040-1041. Of course, ..."

SUBJECT INDEX

Page

TABLE OF CASES ii

TABLE OF CONSTITUTIONAL PROVISIONS iii

TABLE OF STATUTES iii

OPINIONS OF COURTS BELOW 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

ARGUMENT 6

CONCLUSION 13

APPENDIX 15

CERTIFICATE OF SERVICE 22

TABLE OF CASES

Page

Ballew v. State,
—— Ala. ——, 296 So. 2d 206 (1974) 2, 3, 4, 5, 6

Bush v. Tuscaloosa,
50 Ala. App. 44, 276 So. 2d 629 (1973) 9

Hamling v. United States,
—— U. S. ——, 41 L. Ed. 2d 59, 94 S. Ct. ——
(1974) 8

LaValle v. Rose,
410 U. S. 690, 35 L. Ed. 2d 637, 93 S. Ct. 1203
(1973) 11

McKinney v. Tuscaloosa,
49 Ala. App. 21, 268 So. 2d 488 (1972) 7, 9

Miller v. California,
413 U. S. 15, 3 7L. Ed. 2d 419, 93 S. Ct. 2607
(1973) 7, 11, 12

Stanley v. Georgia,
394 U. S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243
(1969) 11

United Artists Corp. v. Wright
(M. D. Ala. 1974) 368 F. Supp. 1034 9

Visual Educators Inc. v. Koepel
289 Ala. 410, 268 So. 2d 22 (1972) 7, 10

TABLE OF CONSTITUTIONAL PROVISIONS

	Page
First Amendment to the Constitution of the United States	3
Fourteenth Amendment to the Constitution of the United States	3

TABLE OF STATUTES

	Page
Act No. 698, Acts of Alabama, 1969	8, 9, Appendix A

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURTS BELOW

The memorandum of the Court of Criminal Appeals of Alabama, affirming the Petitioner's conviction without opinion, is not reported.

The order and opinion of the Supreme Court of Alabama affirming the petitioner's conviction are reported as follows: *Ballew v. State*, —— Ala. —— 296 So. 2d 206 (1974).

II

QUESTIONS PRESENTED

A.

Is an individual denied due process of law when he is prosecuted and convicted under a state statute outlawing obscenity where he is convicted under a construction of the statute defining "obscenity" in accordance with the pre-*Miller* standards and where state appellate courts reviewed said conviction in light of the *Miller* standards?

B.

May a party who is convicted of selling an obscene publication complain that he lacked *scienter* of the obscene nature of the publication, where the evidence shows that he was previously warned by officials of the probable obscene nature of the publication and that the sale took place following the warning?

C.

Where a party engages in the regular business of selling publications which violate or approach violating the criminal statutes relating to obscenity and for that reason the party charges his customers higher prices than are charged by other business for publications of similar size and quality which do not approach a violation of the law, may such a

party challenge a criminal conviction growing out his business on the grounds that he did not realize the publication in point was obscene?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States.

Act No. 698, 1969 Regular Session of the Alabama Legislature. Acts of Alabama, 1969-1970, Vol. II, pages 1252-1255. (Appendix "A")

IV.

STATEMENT OF THE CASE

The Alabama Supreme Court stated the case and the facts as follows:

> "The appellant operated an Adults Only book store in Mobile. As a result of a sale of a magazine entitled "Penelope, Issue No. 1" he was indicted for selling hard-core pornography. His trial resulted in a verdict of guilty, the jury imposing a fine of $500.00. The court imposed an additional punishment of hard labor for Mobile County for one year.
>
> "The Court of Criminal Appeals affirmed the judgment without an opinion. The appellant duly petitioned this court for a writ of certiorari, and we granted the writ.
>
> "The indictment against this defendant reads:

> The GRAND JURY of said County charged, that, before the finding of this indictment CLAUDE DAVIS BALLEW whose name is to the Grand Jury otherwise unknown than as stated, did knowingly and unlawfully sell to Don Smitherman, who was over 18 years of age, a magazine entitled "Penelope, Issue No. 1 "containing pictures and photographs of the female human body depicting the female genitals in such a manner as to be obscene or to represent hard-core pornography, after said Claude Davis Ballew had been notified in writing by an Assistant Attorney General of the State of Alabama, pursuant to Act Number 698, Acts of Alabama, Regular Session, 1969, that there was reasonable cause to believe that said magazine was obscene and hard-core pornography against the peace and dignity of the State of Alabama.

* * * * * * * *

"In the trial below the State introduced in evidence the magazine entitled "Penelope, Issue No. 1." Additional evidence introduced by the State showed that the Mobile Book Mart is located on Conception Street in Mobile, Alabama. The front of the store had a sign reading "Adult Book Store" followed by the legend, "No one under twenty-one years of age admitted." The front window glasses were rendered opaque by being painted over. The Mobile Book Mart is operated by Clarence Cantey. On 13 May 1970, the premises were visited by Robert E. Morrow, an Assistant Attorney General. On display for sale was the magazine "Penelope, Issue No. 1," along with other magazines. After inspecting the magazines Mr. Morrow served a written notice on the appellant to the effect that he had rea-

sonable cause to believe that certain magazines on display, including "Penelope, Issue No. 1" were obscene, and that continuing to offer the materials for sale constituted a violation of Act 698. The next day, Donal T. Smitherman, a 29 year old member of the Vice and Narcotics Squad of the Mobile Police Department, entered the store and purchased a copy of "Penelope, Issue No. 1" from the appellant who was in charge of the store as manager.

"The defense offered only one witness, Dr. Robert M. Dowd. Dr. Dowd, who at the time of the trial was currently on leave from the Department of Psychiatry of Tulane University Medical School. He was spending his leave as Assistant Professor of Family Health and Population Dynamics, studying psychiatric aspects of family planning. Dr. Dowd testified as an expert on the question of whether Penelope, Issue No. 1 appealed predominately to a prurient interest in sex or nudity, and whether the magazine had any redeeming social value.

"Dr. Dowd testified that in his opinion the magazine did not appeal predominantly to a prurient sex interest in that it pictures just female nudes, and is not sick or morbid.

"He further testified that the magazine had redeeming social value in that it would tend to satisfy male curiosity as to female form, and in that aspect might be educational.

"He further testified that in his opinion the magazine might be educational to adult females in that some females are curious about their bodies in comparison with

the bodies of other females, and in this sense might also be therapeutic.

"As stated above, the magazine "Penelope, Issue No. 1" was received in evidence. It was therefore before the court and jury at the trial level, it was before the Court of Criminal Appeals, and is now before us. From the outside of the front cover to the back of the back cover, the magazine consists of nude females in poses contrived to depict their genitals and breasts. The weight to be accorded Dr. Dowd's testimony was within the province of the jury, as was the weight to be accorded all of the evidence. From the verdict rendered, it must be inferred that the jury attached little or no weight to Dr. Dowd's testimony. The trial judge by his entry of the judgment pursuant to the verdict, and the Court of Criminal Appeals by its affirmance of the judgment, apparently found no reason to question the conclusions of the jury in this aspect. From our examination of Penelope, Issue No. 1, we too are in hearty accord with the correctness of the jury verdict in this aspect."

The Supreme Court of Alabama affirmed the petitioner's conviction on May 9, 1974. *Ballew v. State*, —— Ala. ——, 296 So. 2d 206 (1974).

V.

ARGUMENT

A.

The petitioner argues at length that he was denied due process because the state courts had previously construed the Act in question to outlaw obscenity as defined prior

to *Miller v. California* (413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 [1973]), but, that although he was tried under the pre-*Miller* definition, his appeal was decided under the *Miller* standards. There are several serious difficulties with the petitioners arguments.

First, "obscenity" under the Act is question, Appendix "A", had never been construed or defined prior to the petitioner's case. *Visual Educators Inc. v. Koeppel,* (289 Ala. 410, 268 So. 2d 22 [1972]) cited by the petitioner, did not concern the Act but rather concerned the general public policy relating to obscenity. Only two cases appear to have been decided under the Act prior to *Miller.* These were: *McKinney v. Tuscaloosa*, 49 Ala. App. 21, 268 So. 2d 488 (1972) and *Bush v. Tuscaloosa,* 50 Ala. App. 44, 276 So. 2d 629 (1973), the latter being decided about three months before *Miller.* Both cases were reversed on procedural grounds and required no application of any definition of obscenity to the materials involved. Therefore, the petitioner can not complain that the definition of "obscenity" was changed; prior to *Miller* the Alabama Courts had not construed "obscenity" under the Act. And, when it was construed, the State Courts appropriately followed *Miller.*

The second difficulty with the petitioner's argument is that he was tried and convicted under the pre-*Miller* definition. The pre-*Miller* standards were considerably more liberal than the *Miller* standards. If "Penelope, Issue No. 1" presented some weird case of a publication which could be outlawed prior to *Miller,* but not under *Miller,* the petitioner might have an argument. However, Chief Justice Heflin's concurring opinion in the Alabama Supreme Court, indicates that the Court kept an eye on both sets of standards in deciding the case.

The third difficulty with the petitioner's argument is that it has been decided against him in *Hamling v. United States*, —— U. S. ——, 41 L. Ed. 2d 590, 94 S. Ct. —— (1974).

B.

The petitioner's arguments on *scienter* appear to disregard the fact that he was formally warned of the probable obscene nature of "Penelope, Issue No. 1" prior to the sale out of which his conviction grew.

The *scienter* problem is a serious one in the case of one who might not know of the nature of the materials he is selling. For example, an employee of a drug store whose magazine rack is serviced by a distributing company. Such an employee might sell an obscene publication not knowing its obscene nature and yet find himself arrested, prosecuted and perhaps convicted.

With this in mind, the Alabama Legislature passed Section 4 of the Act. This section reads as follows:

> "Section 4. (a) No prosecution may be commenced against any person for violating Sections 2 and 3 of this Act unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this Act, and the accused has, after receiving such notice violated this Act.
>
> "(b) The written notice provided for in paragraph (a) of this Section 4 may be given by only the following officials: the State Attorney General and any Assistant Attorney General; the district attorney, county solicitor, their

assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the Department of Public Safety.

"(c) Any person receiving such written notice provided for in paragraph (a) of this Section 4 shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this Act."

Prior to January 5, 1974, the Alabama Courts had construed the Act to require notice as an absolute precondition to prosecution. *McKinney v. Tuscaloosa,* 49 Ala. App. 21, 268 So. 2d 488 (1972). And, the notice was required to be actually served in writing on the defendant so that service on a theatre manager, for example, did not cover a projectionist who was not actually served. *Bush v. Tuscaloosa,* 50 Ala. App. 44, 276 So. 2d 629 (1973). Thus, in the example given earlier, the drug store employee could be prosecuted under the Act only if he was first actually warned in writing of the probable obscene nature of the publication and then sold it. This provision seemed to be the best answer to the *scienter* problem.

However, on January 5, 1974, a three Judge panel sitting in the United States District Court for the Middle District of Alabama found Section 4 of the Act unconstitutional. *United Artists Corp. v. Wright,* (M. D. Ala., 1974) 368 F. Supp. 1034. The Court reached its decision on the basis of three

conclusions of law.

First, the Court found that the warning provision constituted a prior restraint, however, as the Court correctly noted, this was not enough in itself to make the statute unconstitutional. 368 F. Supp. 1034, 1039-1040.

Secondly, the Court held that the burden of proving that the material was without the protection of the First Amendment is on the would be censor. 368 F. Supp. 1034, 1040. This is, of course, the law. However, the Court found that under Alabama law, the burden would be on one who sought declaratory judgment that the material in question was not obscene to prove that it was not. The Court cited Section 4 (c) (supra at page 9) of the Act as authority for this proposition. However, this section defines no burden of proof. The Court was either unaware of or disregarded *Visual Educators v. Koeppel* (289 Ala. 410, 268 So. 2d 22 [1972]), which arose out of a suit by a corporation against a would be censor. The Alabama Supreme Court clearly held in that case: "It is, of course, incumbent upon the censor to prove that the film in question is obscene." 268 So. 2d 22, 25.

Finally, the court found no provision of Alabama Law arising out of matters involving expression. 368 F. Supp. arising out of matters involving expression. 268 F. Supp. 1034, 1040-1041. Of course, Alabama Law provides for temporary restraining orders, but it is silent on the speedy final determination of declaratory judgement actions involving expression.[1] In the face of this silence, the three

[1]This is in large measure the result of the uniform practice of persons and institutions who are engaged in expression of bringing civil actions in Federal rather than State Courts. The result has been that, while Alabama's Criminal Law relating to obscenity has shown development comparable with the rest of the Nation, the State's Civil Law relating to obscenity has been stunted. Huge areas exist where there are no cases on the books because the issues have never been presented to a State Court.

Judge panel apparently decided that the State Courts would no doubt disregard the Constitution and refuse a request for a speedy determination. This seems to fly in the face of the general rule that state officials are presumed to obey the Constitution. See *LaValle v. Rose*, 410 U. S. 690, 35 L. Ed. 2d 687, 93 S. Ct. 1203, (1973).

All this being as it may, the State of Alabama is now cut off from the most simple and effective answer to the *scienter* problem. However, this petitioner can hardly claim that he lacked *scienter*. He was officially warned in writing that "Penelope, Issue No. 1" was probably obscene. The Petitioner did nothing about the warning and the next day sold the magazine which forms the basis of this prosecution.

C.

The petitioner was not convicted for preaching unpopular political ideas. Nor, is he a religious or phylosophical dissenter. He has not been convicted for engaging in discussion or dissemination of his ideas. Rather, he was, to put it bluntly, the operator of a "dirty book" store.

One theme which runs throughout our law is that different standards apply to the individual who does something gratuitously than apply to the businessman who does the same thing for profit. This distinction has been recognized in the area of expression. In *Stanley v. Georgia*, (394 U. S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 [1969]), this Honorable Court ruled that a state may not outlaw the private possession of obscene matter. *Stanley* was cited with approval in *Miller v. California* (413 U. S. 15, 19, 37 L. Ed. 2d 419, 427, 93 S. Ct. 2607 [1973]). Yet, further on in *Miller*, the Majority makes this observation:

"The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a misuse of the great guarantees of free speech and free press. . . . Breard v Alexandria, 341 US, at 645, 95 L Ed 1233, 35 ALR2d 335. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people, Roth v United States, supra, at 484, 1 L Ed 2d 1498 (emphasis added). See Kois v Wisconsin, 408 US, at 230-232, 33 L Ed 2d 312; Thornhill v Alabama, 310 US, at 101-102, 83 L Ed 1093. But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain is a different matter. [footnote omitted] 413 U. S. 15, 34-35, 37 L. Ed. 2d 419, 437.

Therefore, there is established a distinction between the person who engages expression, even of an obscene nature, privately and gratuitously and the businessman who engages in the sale of commercial obscenity.

In the instant case, the evidence shows that the petitioner operated any "Adult Book Store." Such stores have sprung up across the land. These businesses are dedicated to the sale of commercial materials of an erotic nature. These materials are outlandishly expensive, often times costing many times

the price of similar publications which are not erotic in nature. Since it costs no more to reproduce erotic materials than it does to reproduce great works of art of a similar size and quality, and, from all reports, business is excellent, it must be assumed that the high prices are designed to compensate the businessman for the risks he runs in selling the stuff. To permit such an individual to avoid these risks by embracing an Amendment designed to protect intellectual dissent and discussion is pointless.

CONCLUSION

In conclusion, the Respondent, the State of Alabama, respectfully submits that the decision of the Supreme Court of Alabama is correct and that the writ of certiorari ought to be denied and prays such denial.

Respectfully submitted,

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APPENDIX

APPENDIX A

ACTS OF ALABAMA, 1967-1970, Vol. II
Pages 1252-1255

ACT NO. 698

AN ACT

To prohibit the exposing of obscene and harmful materials to persons eighteen years of age and older; to define terms and to prescribe penalties.

Be It Enacted by the Legislature of Alabama:

Section 1. Definitions. As used in this Act.

(a) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state

(b) "Sexual conduct" means act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(c) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(d) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Obscene" means that description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or

morbid interest, and (ii) is patently offensive to prevailing or contemporary standards in the adult community as a whole with respect to what is suitable material, and (iii) is utterly without redeeming social value or importance.

(g) Hard-core pornography" means material, when considered as a whole, its predominant appeal is to prurient interest, is patently offensive to prevailing or contemporary standards, is utterly without redeeming social value or importance and in addition it goes substantially beyond customary limits of candor in describing or representing such matters.

(h) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant.

(ii) such term includes the calculated purveyance of filth.

(i) Mailable matter means (a) printed or written matter or material having second-class mailing privileges under the laws of the United States or ;(b) any other printed or written matter or material which has not been determined to be non-mailable under the laws of the United States.

Section 2. Selling, exhibiting or possessing obscene materials. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a person eighteen years of age or older:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is obscene or represents hard-core pornography.

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of section 2 hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is obscene or represents hard-core pornography.

(c) Nothing in this section shall be deemed to apply to mailable matter unless such mailable matter is known by such person to have been judicially found to be obscene or to represent hard-core pornography under this act or under the provisions of any other Alabama statutes.

Section 3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to another or knowingly to sell to another an admission ticket or pass or knowingly to admit another for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse which is obscene or represents hard-core pornography.

Section 4. (a)No prosecution may be commenced against any person for violating Sections 2 and 3 of this Act unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this Act, and the accused has, after receiving such notice violated this Act.

(b) The written notice provided for in paragraph (a) of this Section 4 may be given by only the following officials: the State Attorney General and any Assistant Attorney General; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the Department of Public Safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this Section 4 shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this Act.

Section 5. Any person, firm or corporation violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars ($2,000.00) for each offense, or be both so imprisoned and fined, in the discretion of the court.

Section 6. The provisions of this Act are cumulative and shall be in addition to any and all laws now enacted dealing with obscene or hard-core pornography and shall not be construed to limit or repeal other laws on such matters and shall specifically apply to the exposing of obscene and harmful materials to persons eighteen years of age and older.

Section 7. This Act shall become effective immediately

upon its passage and approval by the Governor or upon its otherwise becoming a law.

Approved September 10, 1969.

Time: 4:20 P.M.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General, one of the attorneys for the State of Alabama, Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this ____ day of December, 1974, I did serve the requisite number of copies of the foregoing Brief and Argument and Appendix on each of the Attorneys for the Petitioner, by mailing the same to them, first class postage prepaid, in the case of Mr. Ritchey and Air Mail postage pre-paid in the case of the other attorneys, and addressed to them as follows:

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